

claiming the compensation because the accident has occurred due to his act. Therefore, assessment of the income of the deceased and the resultant award passed by the learned Tribunal in favour of the claimants is not in consonance with the law.

It is pertinent to mention here that the Motor Vehicles Act is a social legislation. Certainly the technicalities and niceties cannot be allowed to raise in order to defeat the purpose of the Act. But when the claim is not genuine, the claimants certainly have to cross the technicalities and niceties of the law, as the accident is not a bonanza for the claimants.

For the reasons mentioned above, this appeal is allowed. The findings recorded by the learned tribunal on Issue No. 1 and 2, are set aside and the claim petition is dismissed.

(Nirmal Singh)
Judge

Jammu:
Dt.3.9.07
RSB,PS*

of the offending vehicle. This Section in-so-far-as relevant reads as under:-

“163-A.Special provisions as to payment of compensation on structured formula basis.”-(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out to the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs of the victim, as the case may be.

Explanation.- For the purposes of this sub section, “permanent disability” shall have the same meaning and extent as in the Workmen’s Compensation Act, 1923(8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.”

Even otherwise, the claimants are not entitled to any compensation. Admittedly, the deceased was 52 years of age at the time of her death and she was not residing with the claimants. Sandeep Dhar-claimant No.1 while appearing as his own witness had deposed that he was posted at Bangalore and the deceased was not living with him. Sudhir Dhar-claimant No.2, has also not deposed that the deceased was living with him. She was residing with her husband, Hira Lal Dhar, who was driving the offending vehicle. Hira Lal Dhar in his reply has stated that he has no knowledge with regard to the income of the deceased. In view of the said reply filed by Hira Lal Dhar, who is the husband of the deceased, it is established that the deceased was having no income nor the claimants were dependent upon her. The deceased was dependent on her husband Hira Lal Dhar. Even otherwise, if she was rendering any help, that was being rendered to Hira Lal Dhar-respondent No.3 only. If any loss has occurred, that is to Hira Lal Dhar who is debarred from

vehicles or damages to any property of a third party so arising, or both.”

Without proving the negligence, the liability cannot be fastened on the owner because the liability of the owner of the offending vehicle to compensate the victim of the accident due to the negligent driving of his servant is based on the law of tort, as it has been laid down in *Minu B Mehta and another Vs. Balkrishna Ramachandra Nayan and another* AIR 1977 SC 1248, wherein it has been held as under:-

“ The liability of the owner of the car to compensate the victim in a car accident due to the negligent driving of his servant is based on the law of tort . Regarding the negligence of the servant the owner is made liable on the basis of vicarious liability. Before the master could be made liable, it is necessary to prove that the servant was acting during the course of his employment and that he was negligent. Under section 95(1)(b)(i) it is required that policy of insurance must be a policy which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. The insurance policy is only to cover the liability of a person which he might have incurred in respect of death or bodily injury. The accident to which the owner or the person insuring is liable to the extent of his liability in respect of death or bodily injury and that liability is covered by the insurance. Therefore, if the owner has not incurred any liability in respect of death or bodily injury to any person there is no liability and it is not intended to be covered by the insurance. The expression “ liability which may be incurred by him” is meant as covering any liability arising out of the use of the vehicle. A person is not liable unless he contravenes any of the duties imposed on him by common law or by the statute . In the case of a motor accident the owner is only liable for negligence and on proof of vicarious liability for the acts of his servant . Proof of negligence is therefore necessary before the owner or the insurance company could be held liable for the payment of compensation in a motor accident claim case.”

There is, however, only one exception that when an application is filed under Section 163-A of the Act, then the claimant is not required to prove the negligence of the driver

When a claim petition is filed for claiming compensation, it is for the claimants to prove the negligence but in some cases it is difficult for the claimants to prove the exact cause of accident. In such cases, the courts apply the principle of Res Ipsa Loquitur that the accident speaks for itself or tells its own story. In the instant case, the claimant-respondents have not produced on record any photograph of the accident. The other passengers of the accident, as indicated above, have not received any injury even though they were traveling in the same vehicle. In case, the witnesses are not available, the court can apply the principle of Res Ipsa Loquitur but when the witnesses are available and they can give the true cause of the accident, then it is incumbent upon the claimants to examine the witnesses who are available to prove that the accident was caused by the negligence of the offending vehicle which in the present case has not been done. Thus, for claiming the compensation under the Act, the claimants have to prove the negligence which is the prime consideration.

The learned Tribunal while awarding the compensation has taken into consideration the provisions of Sections 163, 165 and 168 of the Act. The interpretation of the learned Tribunal of these Sections is palpably erroneous. Once a claim petition is filed under Section 166 of the Act for claiming compensation arising out of an accident of the nature as specified in sub Section 1 of Section 165 of the Act, then the claimants have to prove the negligence of the driver of the offending vehicle. Section 165(1) of the Act reads as under:-

“165(1): A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor

was driving the vehicle rashly and negligently. The said passengers seem to not have been examined and with-held purposely so that the truth may not come out.

The case of the claimants hinges on their own statement. They are not the witnesses of the accident. Their evidence with regard to the accident is hear-say. The witnesses of the accident as per the claimants were available but as indicated above, they have not been examined for the reasons best known to the claimants. The tribunal while deciding Issue No.1 , observed as under :

“There is no direct evidence about rashness and negligence in driving the vehicle Maruti Car No. 2753-JKE by respondent-2 Dr. Hira Lal , except the averments made in the petition and FIR copy whereof is on record and reference made to hereinabove, and challan bearing file No. 27/ challan instituted on 3-7-1992 decided on 23-10-1994 by the court of Judicial Magistrate, Ramban titled State Vs. Hira Lal under sections 279/337/304-A RPC is there.”

It has further been observed as under:-

“Even apart from it when driver and the passenger were traveling in a motor car and the driver himself has not sustained any injury while passengers in the car has died, itself speaks volumes that driver himself has found something wrong while plying and has managed to save himself leaving the passenger in the car at the mercy of that passenger speaks volumes and has inherent in it the rashness and negligence though may not amount to criminal rashness or negligence but definitely amounts to civil negligence and rashness.”

The learned Tribunal has presumed that the negligence of the driver Hira Lal Dhar may not be a criminal rashness or negligence but definitely amounts to civil rashness and negligence. These observations of the learned Tribunal are not in consonance with the evidence on record. Hira Lal Dhar-driver of the offending vehicle has denied that the accident occurred due to rash or negligent driving.

witness from the police station who can identify the writing of the author of the FIR.

In *Vijender v. State of Delhi*, 1997(6) SCC 171, it has been held as under:-

“In view of Section 60 the prosecution is bound to lead the best evidence available to prove a certain fact and in the instant case it was the doctor who held the post-mortem examination. It was of course true that in an exceptional case where any of the prerequisites of Section 32 are fulfilled a post-mortem report can be admitted in evidence as a relevant fact under sub-section (2) thereof by proving the same through some other competent witness but this section had no manner of application in the present case for the evidence of the record clerk clearly reveals that on the date he was deposing the doctor who conducted the post mortem was in the hospital where the post-mortem was conducted. The other reason for which the trial Judge ought not to have allowed the prosecution to prove the post-mortem report is that it was not the original report but only a carbon copy thereof and that too not certified. Under Section 64 of the Evidence Act document must be proved by primary evidence, that is to say, by producing the document itself except in the cases mentioned in Section 65 thereof. Since the copy of the post-mortem report did not come within the purview of any of the clauses of Section 65 it was not admissible on this score also.”

In the instant case, the claimant-respondents have not proved the copy of the FIR nor the post-mortem report. Even these documents have not been exhibited or marked.

It is pertinent to mention here that in the FIR, it has been mentioned that there were other passengers also in the offending vehicle. The said passengers have not received any injury. They have not lodged any report nor they have been examined to prove that Hira Lal Dhar, driver of the vehicle

In view of the legal position, the claim petition has to be entertained on behalf of all the legal representatives of the deceased, who are entitled for compensation under the Act . Where all the legal representatives of the deceased have not joined, then the petition can be made on behalf of any of the legal representative of the deceased by impleading those legal representatives who have not joined in filing the claim petition, as respondents. But the claim petition will be deemed to have been filed on behalf of all the legal representatives. In case one of the legal representative is debarred to claim compensation because the death of the deceased has occurred due to his act, then all the legal representatives are not entitled to claim the compensation under section 166 of the Act because it is the mandate of law that the petition can only be filed by all the legal representatives and either they will have to be impleaded as claimants or proforma respondents but it will be for the benefit of all the legal representatives.

In the case in hand, as per the claimants, the accident has been caused by Hira Lal Dhar, who is the husband of the deceased and also one of the legal representative. Therefore , the petition under section 166 of the Act, is not maintainable.

The present appeal is to be accepted on other grounds also. The learned tribunal has erred in deciding issue No.1 in favour of the claimants solely on the basis of copy of the FIR and the post mortem report. These two documents, upon which reliance has been placed by the tribunal are not per-se admissible. The post mortem report can only be proved by examining the doctor who has conducted the post mortem examination or by a person who identifies the writing of the doctor. In case of FIR, the same can be proved by examining the complainant who has lodged the report or by examining a

adjudicate the aforesaid proposition, it will be appropriate to notice section 166 of the Act, which reads as under:-

“ 166. **Application for compensation (1)** An application for compensation arising out of an accident of the nature specified in sub section (1) of section 165 may be made:

- a) by the person who has sustained the injury; or
- b) by the owner of the property; or
- c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
- d) by any agent duly authorized by the person injured or all or any of the legal representatives of the deceased, as the case may be :

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.”

The Apex Court while interpreting the provision of section 166 of the Act in Smt. Manjuri Bera Vs. The Oriental Insurance Company Limited and another, reported in 2007(3) Supreme 620, has held as under:

“ In terms of clause (c) of sub section (1) of Section 166 of the Act in case of death, all or any of the legal representatives of the deceased become entitled to compensation and any such legal representative can file a claim petition. The proviso to said sub section makes the position clear that where all the legal representatives had not joined , then application can be made on behalf of the legal representatives of the deceased by impleading those legal representatives as respondents. Therefore, the High Court was justified in its view that the appellant could maintain a claim petition in terms of section 166 of the Act.”

In the facts and circumstances of the case, the permission to defend the claim in the name of the insured, though not expressly granted can be deemed to have been granted.”

In view of the above, the appeal filed by the insurance company is maintainable and has to be considered on merits.

Mr. R.K. Gupta, learned counsel appearing for the appellant submitted that the tribunal has erred in accepting the claim petition and passing the impugned award. He contended that there is no evidence on record that the driver of the offending vehicle was negligent. He further contended that till it is proved that the driver is negligent, the compensation cannot be awarded. He further submitted that application under section 166 of the Act can only be entertained on behalf of **all the legal representatives**. He further contended that when the accident had occurred due to some act on part of one of the legal representative, then the claim petition cannot be entertained.

On the other hand, Mr. P.N. Goja, learned counsel for the respondents submitted that compensation under the Act can be awarded even without giving any finding by the tribunal that the driver was driving the vehicle in a rash and negligent manner. He submitted that claim petition cannot be rejected simply on the ground of non-joinder or mis-joinder of the party. He further submitted that when the accident has occurred due to the act of one of the legal representatives’, he is debarred from claiming the compensation but the remaining legal representatives are not debarred in this regard.

In the light of the above submissions, I will have to consider a short but interesting question of law as to whether the claim application can be entertained on behalf of some of the legal representatives, when due to the act of one of the legal representatives’, the accident has occurred. To

taken in the written statement of the insurer were not confined to the grounds available to it under section 96(2) (b), and no objection raised when the claimant's witnesses were cross-examined by the insurer on the lines much beyond the scope of section 96. It would, therefore, be quite fair to assume that although no orders had been recorded in writing by the Tribunal, it did allow the insurance company to contest the claim on the grounds which were available to the owner of the vehicle and it would be too late for the claimant to contend that rights of the insurer are confined to the grounds mentioned in section 96(2) of the Act."

This Court in *National Insurance Company Limited Vs. Bashir Ahmad Gojri and others*, reported in 2000 ACJ 1108, held as under :

" Section 96(2) of the old Act and section 149(2) of the new Act specifies the grounds which are available to insurer to defend an action for compensation before the Tribunal. The insurer is entitled to defend on the specified grounds. However, the insurer can resist the claim before the tribunal or challenge the award in appeal on the grounds other than those enumerated in the section, where either the insurer has reserved the right in the policy of insurance to defend the claim in the name of the insured or where the tribunal or the courts are satisfied that the insured and the claimants have colluded with each other or the leave of the tribunal under section 110-C(2-A) of the Old Act has been granted to the insurer for defending the claims on grounds on which the insured could have defended the claim.

In this case, the driver and owner of the vehicle despite being duly served have remained absent and have been set ex parte, in the insurer (appellant) has filed written statement before the tribunal. It is revealed that the insurance company has been allowed to resist the claim and defend the action on all counts, even beyond the confines of section 96(2) of the Motor Vehicles Act, 1939. Even the witnesses examined by the petitioners were allowed to cross examined by the appellant on all counts before the tribunal.

The respondent No.3, who is the father of the claimants, has not denied the allegations that the claim petition has not been filed with his collusion rather he has admitted the contents of the claim petition. The claimants had not impleaded in the original petition, Farooqi M Ahmad as party respondent who was the registered owner of the offending vehicle. But subsequently, on the objection raised by the appellant Company, he was impleaded as party respondent. Farooqi M Ahmed, on appearance admitted the claim and pleaded that he had authorized respondent No. 3 to ply the vehicle but the said vehicle met with an accident.

Therefore, from the pleadings, it has been proved that Farooqi M.Ahmed was the registered owner and Hira Lal Dhar was the driver of the offending vehicle and they have collided with the claimants. The insurance company had taken a specific ground, as mentioned above in their objections and the tribunal has allowed the appellant-Company to cross –examine the witnesses on the grounds which were not available to it under section 149(2) of the Act. The claimants have not raised any objection before the Tribunal that the appellant cannot resist the claim except the grounds available to it under sub Section 2 of Section 149 of the Act. Therefore, when the Tribunal has allowed the appellant to raise all the pleas which were not available to it under Section 149(2) of the Act, then it will be a deemed permission to contest the claim petition.

A Division Bench of the Allahabad High Court in Oriental Fire and General Insurance Company Ltd. and another Vs. Rajendra Kaur reported in 1989 ACJ 961, held :

“ That in certain contingencies mentioned under section 110-C(2-A) of 1939 Act , the insurance company will have a right to defend the claim even on grounds other than those mentioned in section 96(2) . In the absence of the owner having kept away and when no objection at any stage was taken by the claimant that the grounds

The appellant-Company is entitled to defend the claim on any of the grounds as culminated in sub section 2 of section 149 of the Act or other grounds which are available to it under the terms of insurance policy. However, the insurer can resist the claim before the tribunal or challenge the award in appeal on the other grounds where the tribunal or the Court is satisfied that the claimants and the insurer have collided with each other, as mentioned in section 170 of the Act, which reads as under:-

“ 170. Impleading insurer in certain cases:

Where in the course of any inquiry, the Claims Tribunal is satisfied that :

- a) there is collusion between the person making the claim and the person against whom the claim is made, or
- b) the person against whom the claim is made has failed to contest the claim, it may , for reasons to be recorded in writing , direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have , without prejudice to the provisions contained in sub section 2 of section 149 , the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.”

The appellant-company in its objections before the Tribunal had taken a specific stand that the claim petition has been filed in collusion with respondent No.3 being the father of the claimants . The claimants had not filed any rejoinder to rebut the said assertion of the appellant. No doubt, in the present case, a specific order has not been passed by the Tribunal to contest the claim other than enumerated in sub section 2 of section 149 of the Act, but the Tribunal has allowed the appellant company to raise all the pleas available to it. The appellant/company has cross- examined the witnesses produced by the claimants on all the points but the claimants had not raised any objection at that time.

2. Whether the accident was caused due to rash and negligent driving of respondent-2 and the vehicle in question is insured with the respondent-1 and the petitioners are entitled to compensate and from whom ? OPP
3. Relief.”

After recording the evidence of the parties, the learned tribunal decided both the issues against the appellant and passed the award in favour of the claimants, aggrieved by which, the present appeal has been preferred by the Insurance Company.

Mr. P.N. Goja, learned counsel for the claimants raised a preliminary objection that the appeal is not maintainable. He submitted that the appellant –company did not seek permission of the tribunal to defend the claim petition on the grounds other than those available to it under section 149(2) of the Motor Vehicles Act, 1988(hereinafter called the Act).It is stated that in absence of any such permission, the appellant cannot challenge the findings of the tribunal touching the genesis of the accident and quantum of compensation.

On the other hand, Mr.R.K. Gupta, learned counsel for the appellant submitted that the appellant had taken objections in the written statement filed before the Tribunal that there is collusion between the claimants, the owner-respondent No.4 and driver-respondent No.3, who is the father of the claimants and the husband of the deceased who died in the accident.

I have given my thoughtful consideration to the submissions made by the learned counsel for the parties and perused the record.

income of the deceased was Rs. 4500/- . It was pleaded that at the time of accident, the vehicle was insured with the appellant company under Policy No.3135120105765.

The appellant filed the objections to the claim petition and took the plea that the company is not liable to pay the compensation as the claim petition has been filed in collusion with Hira Lal Dhar respondent-3 being father of the claimants and the registered owner of the vehicle-respondent No.4. The other averments made in the petition were denied. However, it was admitted that the vehicle was insured with the appellant Company.

Respondent No.3-Hira Lal Dhar also admitted that the vehicle was driven by him but it was denied that he was driving the same in rash and negligent manner or that the death was caused due to his negligence. It was also pleaded that the vehicle is owned by respondent No.4-Farooqi M.Ahmed and insured with the appellant but it was denied that the deceased was having the income of Rs.4500/- per month.

Respondent-4, Farooqi M. Ahmad, admitted the contents of the claim petition by pleading that he is the owner of the vehicle and he had authorized respondent-3 to drive the vehicle but unfortunately the said vehicle met with an accident.

The learned tribunal on the pleading of the parties, framed the following issues:

“1. Whether the vehicle bearing registration No. 2753- JKE was being driven respondent-2 rashly and negligently resulting in the death of one Lalita Dhar at Chanderkot on 18-6-1992? OPP

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

CIMA No. . 219/98

Dt.3.9.07

**New India Assurance Co. Ltd. Vs. Dr. Sandeep Dhar
and others.**

CORAM:

HON'BLE MR. JUSTICE Nirmal Singh, Judge

APPEARING COUNSEL:

For the appellant(s) : Mr. R.K. Gupta, Advocate.

For the respondent(s): Mr. P.N. Goja, Advocate.

i)	Whether to be reported in Press/Journal/Media:	Yes/No.
ii)	Whether to be reported in Digest/Journal:	Yes/No.

This appeal is directed against the award dated 28-7-1998 vide which the claim petition filed by the respondents 1 and 2 (here-in-after called the claimants) , has been accepted and a sum of Rs. 1,14,500/- has been awarded as compensation passed on account of the death of their mother, Lalita Dhar.

The relevant facts for the disposal of this appeal are that Lalita Dhar, mother of claimants was traveling in a Maurti Car bearing No. 2753-JKE on 18-6-1992 from Jammu to Srinagar. The said car was driven by respondent-3, Hira Lal Dhar-father of the claimants. It is pleaded that when the car reached at Chanderkot, it went out of the control of respondent No.3 who was driving the same in a rash and negligent manner and fell down into a khud causing the death of Lalita Dhar instantaneously. A case was registered under sections 279/337/ 304-A RPC vide FIR No. 72 of 1992 in Police Station, Batote. The claimants being the sons of the deceased, filed the claim petition for compensation amounting to Rs. 7.00 lacs by pleading that the monthly